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Ontario Human Rights Commission Guidelines on Special Programs

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PLEASE NOTE

These guidelines contain the Commission's interpretation of the provisions of the Code relating to Special Programs. They are subject to interpretation by boards of inquiry and the courts and should be read in conjunction with those decisions and with the specific language of the Code.

The following is a copy of the Commission's newly released *Guidelines on Special Programs*.

In response to the pressing need for leadership in promoting a better understanding of special programs, and the growing demand for such a document in the practitioner community, the Commission has published these Guidelines in their present format as part of an ongoing consultative process.

It is the Commission's intention to assess this working document over the next year. During this time, we will, therefore, welcome the input of interested parties. We anticipate that the document will be referred back to the Commission in the summer of 1991 for a decision regarding any possible modifications which may arise out of practical experience, evolving case law and community input.

Your comments and input are therefore invited as we undertake our consultation process on this document.

Catherine Frazee

Catherine Frazee

Chief Commissioner

August, 1990

GUIDELINES ON SPECIAL PROGRAMS

PREAMBLE

As the Commission's enforcement initiatives focus increasingly on systemic discrimination and special program remedies, employers, landlords and service providers may choose to proactively adopt measures to address systemic barriers which may exist within their operations. To assist them in these efforts to promote greater equality, the Commission has developed the following Guidelines on Special Programs.

INTRODUCTION

Ontario is a society of ever-expanding diversity, composed of women and men of different racial and ethnic origins, cultures, religious beliefs, abilities and a host of other differences.

In our province it is, therefore, imperative that we value all people in their diversity and ensure that each person has the opportunity to fully participate in our society. It is only in this way that we can create an environment of true equality.

The *Human Rights Code*, 1981, reflects Ontario's commitment to equality for all members of society. Historically, the concept of equality has been interpreted to mean that all persons should receive the same or similar treatment. Over time, however, we have come to recognize that the provision of the same or

similar treatment to all persons or groups does not always yield an equal result or equality in its fullest sense. The notion of similar treatment ignores diversity and the special needs of disadvantaged groups.

Often the hardship or economic disadvantage experienced by particular groups can be remedied only through the provision of treatment that is responsive to the particular needs of that group. Programs which incorporate such treatment are referred to in the *Code* as "special programs". Such programs have also been called "affirmative action" programs or "equity" programs (e.g. employment equity, service equity). These guidelines are intended to encourage the adoption of special programs by clarifying the scope and application of section 13, the role of the Commission with respect to special programs and general criteria for assessing a proposed special program. The groups for whom these programs are developed are generally referred to as "target" or "designated" groups. In this document, we will refer to these groups as "designated" groups.

Section 13 of the *Code* expressly allows for the adoption of special programs which are designed to relieve hardship or economic disadvantage; to achieve or attempt to achieve equal opportunity. Section 13 also allows for special programs that are likely to contribute to eliminating the infringement of rights of those who experience discrimination.

For example, when an employer imposes a strict height requirement for everyone who enters employment, the result can be fewer women and members of certain minority groups entering the organization because, on average, they are shorter than the applied standard. This results in a form of discrimination referred to in the *Code* as "constructive" discrimination. Constructive discrimination may result in restricted access to, or complete exclusion from, equality of opportunity or equality of result.

Some groups have experienced longstanding, direct and intentional discrimination which has created formidable and continuing disadvantage. An organization with a history of failing to hire racial minorities may experience difficulty in recruiting members of this group despite an existing policy to invest the same effort in their recruitment as the recruitment of other groups. Such factors as persistent negative attitudes held by existing employees towards racial minority employees, and the perception on the part of prospective racial minority candidates that the work environment is hostile to them, will serve to hinder the company's attempts to remedy under-representation of this group in its workforce.

When one or both of these forms of discrimination pervades a system such as an employment or service delivery system, "systemic discrimination" may be said to exist. Where systemic discrimination has occurred or continues to occur, efforts to provide the same or similar treatment to members of a particular group may not result in equality for that group. In the interests of true equality different forms of treatment may be required.

For this reason, a special program may also be considered the appropriate remedy to a

complaint of systemic discrimination. Special programs may, therefore, be recommended by Commission staff and form part of the settlements in such cases. Moreover, boards of inquiry under the *Human Rights Code, 1981*, may order a special program as the remedy to a finding of discrimination.

In addition, section 28(c) gives the Ontario Human Rights Commission an active mandate to facilitate and encourage the implementation of special programs that comply with section 13. The Commission, therefore, supports and encourages service providers, landlords, contractors, employers and trade unions or vocational associations to voluntarily adopt special programs.

HOW THE CODE DEFINES A SPECIAL PROGRAM

Section 13(1) of the *Code* defines a special program as a program which is:

- 1) designed to relieve hardship or economic disadvantage;
- 2) designed to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity; or
- 3) likely to contribute to the elimination of the infringement of rights under Part I of the *Code*.

Section 13, therefore, recognizes the necessity and legitimacy of programs which take proactive steps to eliminate both the causes and results of disadvantage, regardless of how this disadvantage has arisen. As well, section 13(1) expressly states that equality rights under Part I of the *Code* are not infringed by the implementation of a special program. In light of this provision, the common objection to special programs as "reverse discrimination" is not supported by the *Code*.

STANDARDS FOR SPECIAL PROGRAMS

This section describes the standards for special programs and how they will be applied by the Commission in reviewing special programs. The ideal special program conforms to all of these standards.

Commission staff will apply these standards when constructing settlements involving special program remedies. The Commission will also consider these standards when conducting inquiries into special programs pursuant to section 13(2) of the *Code* (see the following Section entitled "The Commission's Authority to Inquire Into Special Programs"), and when reviewing for approval those settlements which include special program remedies.

The more closely a program approximates the standards articulated in these guidelines, the more likely the program provider will have a successful section 13(1) defense to a complaint against that program. However, the Commission recognizes that not all special programs will meet these standards. In such circumstances, the Commission will be flexible in determining whether a program constitutes a special program that would be protected by section 13(1). Each case coming before the Commission will be considered on its own merits. The following standards should be considered when implementing a special program. A special program should:

1. Be designed to assist disadvantaged persons or groups

A special program should be designed to assist disadvantaged persons or groups with respect to employment, accommodation, contracts, membership in unions or vocational

associations, the provision of services, goods and facilities or some other sphere of activity.

Examples of such assistance could include the provision of special training opportunities, job coaching or mentor programs for designated group members. Targeting non-traditional jobs or training positions for designated group members may also constitute examples of assistive treatment within a special program.

2. Identify Designated Group(s)

The program should clearly define the designated persons or groups that it purports to assist.

The designated groups may include (but are not limited to) persons or groups identified by a prohibited ground of discrimination under the *Code* (race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap, record of offences or receipt of public assistance).

Note: Advertising opportunities for which members of these designated groups will be given preference or exclusive consideration may be an important facet of a special program. While section 22(1) of the *Code* prohibits employment-related advertisements which directly or indirectly classify persons by their membership in specific protected groups, such advertisements are permitted by the Commission in the context of legitimate special programs directed at members of these groups.

3. Provide a Rationale

The program should be based on clearly articulated reasons why the designated groups are considered to be experiencing hardship or disadvantage, and explain how the proposed

measures will relieve this hardship or disadvantage. Evidence of hardship or disadvantage should be objective and where possible, quantifiable, as opposed to impressionistic in nature. For example, in order to show disadvantage in the form of under-representation of a designated group, statistics may be necessary.

Note: Data collection documenting the type and extent of disadvantage experienced by designated group members will often form the foundation for establishing the need for a special program. Ongoing data collection will also provide a means of assessing the results of program initiatives and a tool with which to assess the need for further special measures.

In employment equity programs, internal work force data and applicant data may be collected and compared with external data on designated group availability in order to demonstrate underutilization of particular groups.

In instances where requesting information concerning protected grounds may otherwise constitute a violation of the *Code*, such data collection is clearly permitted in the context of a legitimate special program.

Program providers are encouraged to clearly inform participants in a special program of the purpose for which this information will be used. If participants are confident that this data will be utilized for special program objectives only, they are more likely to be comfortable in providing the requested information.

The *Code* does not specify any requirements with respect to the structure or format that such data collection should take. There are three standard formats for identifying the representation of designated group members within, or served by, an organization: self-

identification surveys, identification by a designate of the organization, and identification by a designate of the organization with confirmation by each identified person. Each method presents its own advantages and disadvantages with respect to associated cost to the organization, rate of return, accuracy of result and preservation of the privacy of the individual. The decision as to which format a particular organization chooses should be made with a view to selecting the method that best suits the program goals and organizational culture.

The privacy and dignity of the individual should be of major concern in the collection of data. Those organizations which are subject to freedom of information and privacy legislation may wish to ensure that the identification method they choose complies with section 41 of the Freedom of Information and Privacy Act. Organizations that are not subject to privacy legislation should also attempt to collect data in a manner that respects the dignity and privacy of each individual.

Organizations subject to data collection requirements of contract compliance programs should note that these requirements are not in conflict with the *Code*.

It should also be noted that data collected in the context of a special program must be used for special program purposes only. For this reason, storage and access of data should be carefully controlled.

4. Follow a Plan

The program provider should prepare a plan outlining how the special program will be implemented, including terms and conditions of the program; duration of the program; special measures to be implemented; and

goals, timetables and anticipated results. Goals, timetables and anticipated results should be expressed in objective and, where possible, quantifiable terms in order to demonstrate how the program is designed to address the existing hardship or economic disadvantage of the designated group or persons. Additionally, accountability for program results should be specified at the appropriate levels within the organization. If for example, the plan includes goals and objectives regarding hiring, and hiring is the responsibility of line managers, those managers should be made accountable within the plan to meet hiring objectives.

5. Include a Monitoring and Evaluation Mechanism

The program should include a mechanism to monitor and evaluate the progress towards the desired results. Such a mechanism is important to evaluate the effectiveness of the program, to facilitate accountability within the organization and to communicate program results to the organization and/or its client groups.

Tracking of applicants through the system and data collection concerning the changing composition of client groups are examples of ongoing data collection which may be necessary components of such a mechanism. As in the case of data collection for the purpose of targeting designated groups, data collection for monitoring and evaluation purposes is also permitted by the *Code* in the context of a legitimate special program.

6. Include Consultation

Appropriate steps should be taken prior to implementation to identify and consult with all persons and groups who may be affected by the proposed special program, including labour unions or employee associations, tenant

associations, service-users and designated group members themselves, or their representatives.

THE COMMISSION'S AUTHORITY TO INQUIRE INTO SPECIAL PROGRAMS

Section 13(2) authorizes the Commission to inquire into a special program upon its own initiative or upon an application of a person seeking to implement a special program under the protection of section 13(1). In either case, the Commission may inquire into the program to ensure that the program satisfies the requirements of section 13 of the *Code* (as set out in the above section "Standards for Special Programs").

Special programs are not immune to complaints of discrimination. Upon a complaint with respect to a proposed special program, the Commission may also inquire into that program to determine whether it qualifies as a special program pursuant to section 13 of the *Code*.

COMMISSION ORDERS IN RESPECT OF SPECIAL PROGRAMS

Following inquiry into a special program, the Commission may, at its discretion, declare by order that:

- 1) the special program does not satisfy the requirements of section 13(1); or
- 2) the special program, with or without modifications, satisfies the requirements of section 13(1).

No person is obliged to seek an order from the Commission prior to implementing a special program, nor is the Commission obliged to issue an order in response to an

application. In fact, the Commission encourages service providers, landlords, contractors, employers and trade unions or vocational associations to review their own operations in light of these guidelines, with a view to voluntarily undertaking initiatives aimed at promoting greater equality in our society.

The circumstances in which the Commission will consider a request to issue an order respecting a special program are generally limited to situations where the parties involved are in dispute about whether the special program complies with section 13, and the dispute cannot be resolved in any other way.

COMPLAINTS OF DISCRIMINATION IN THE ABSENCE OF A PRIOR ORDER

Where there is no prior order from the Commission declaring that a particular program does not satisfy the requirements of section 13(1), the program provider may invoke section 13(1) as a defence to a complaint of discrimination involving that program. If the Commission concludes after investigating the matter that the special program does, in fact, constitute a special program with or without modifications as defined in section 13(1), it may so declare by order, and/or decide not to request the appointment of a board of inquiry, pursuant to section 35(2).

If, however, the Commission determines that the special program does not meet the requirements of section 13(1), the Commission has the authority under section 13(2)(d) to order that the program does not qualify as a special program and/or request the appointment of a board of inquiry under

section 35(1) to determine whether a right has been infringed.

Again, it should be noted that orders made by the Commission are entirely discretionary. The Commission may, for example, decide to send a complaint to a board of inquiry without having issued an order in respect of that program.

COMPLAINTS OF DISCRIMINATION WHERE A PRIOR ORDER EXISTS

An order of the Commission declaring that a special program satisfies the requirements of section 13(1) does not preclude the filing of a complaint of discrimination. However, such an order issued pursuant to section 13(2)(e) provides a defence to the complaint, as long as the terms and conditions of the order are satisfied.

On the other hand, an order of the Commission pursuant to section 13(2)(d) declaring that a special program does not satisfy the requirements of section 13(1), deprives the program provider of the opportunity to invoke a section 13(1) defence to a complaint at a board of inquiry.

SPECIAL PROGRAMS IMPLEMENTED BY THE CROWN

In accordance with section 13(5) of the *Code*, the Commission has no authority to inquire into a special program implemented by the Ontario Government or by an Ontario Government agency for the purpose of issuing orders under section 13(2). However, Crown programs must comply with the provisions of section 13(1) and are not

immune to individual or Commission-initiated complaints of discrimination. Such complaints would be handled in accordance with regular complaint procedures.

Inquiries regarding these guidelines may be directed to:

In deciding whether to request the appointment of a board of inquiry in respect of a complaint concerning a special program of the government or a government agency, the Commission will assess the alleged special program in accordance with the criteria set out above. Should the complaint proceed to a board of inquiry, the board has the authority to make a decision as to whether the program constitutes a special program consistent with section 13(1).

Systemic Investigation Unit
Ontario Human Rights Commission
400 University, 11th floor
Toronto, Ontario
M7A 2R9

APPLICATIONS FOR AN ORDER IN RESPECT OF A SPECIAL PROGRAM

Applications for orders in respect of special programs should be submitted to the Director, Systemic Investigation, of the Ontario Human Rights Commission. Applications should indicate:

- 1) the reason(s) an order is being sought, relative to these guidelines, and
- 2) how the program in question meets the standards set out in these guidelines, (or how it does not meet these standards, in instances where the applicant is requesting an order pursuant to section 13(2)(d) that declares the program does not satisfy the requirements of section 13(1)).

RECONSIDERATION OF AN ORDER

Any person who is aggrieved by the making of an order pursuant to subsection 13(2), is entitled to ask the Commission to reconsider its order.

**EXTRACT FROM HUMAN RIGHTS
CODE (1981)**

SECTION 13

- (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.
- (2) The Commission may,
- (a) upon its own initiative;
 - (b) upon application by a person seeking to implement a special program under the protection of subsection (1); or
 - (c) upon a complaint in respect of which the protection of subsection (1) is claimed
- inquire into the special program and, in the discretion of the Commission, may by order declare,
- (d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or
 - (e) that the special program as defined in the order, which such modifications, if any, as the Commission considers advisable, satisfied the requirements of subsection (1).
- (3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 36, with necessary modifications, applies.
- (4) Subsection (1) does not apply to a special program where an order is made under clause (2) (d) or where an order is made under clause (2) (e) with modifications of the special program that are not implemented.
- (5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown. 1981, c.53, s.13.

THE ONTARIO HUMAN RIGHTS COMMISSION

Ontario Human Rights Commission
400 University Avenue, Toronto, Ontario M7A 2R9
Tel: (416) 314-4500
TDD: (416) 314-4535

Address all correspondence to your closest District Office:

HAMILTON

110 King Street West
Suite 310
L8P 4S6
Tel.: (416) 521-7870
1-800-668-9508
TDD: (416) 546-8278

KENORA

227 2nd Street South
3rd Floor
P9N 1G1
Tel.: (807) 468-2866

KINGSTON

80 Queen Street
Suite 202
K7K 6W7
Tel.: (613) 548-6750
1-800-461-2958
TDD: (613) 267-5755

KITCHENER

824 King Street West
4th Floor
N2G 1G1
Tel.: (519) 570-9622
1-800-263-9525

LONDON

255 Dufferin Avenue
Suite 601
N6A 5K6
Tel.: (519) 438-0076
1-800-268-8333
TDD: (519) 438-4207

MISSISSAUGA

2 Robert Speck Parkway
Suite 310
L4Z 1H8
Tel.: (416) 273-7811
1-800-268-2808
TDD: (416) 273-6648

OTTAWA

255 Albert Street
4th Floor
K1P 6A9
Tel.: (613) 232-0489
1-800-661-0228
TDD: (613) 232-3909

SAULT STE. MARIE

390 Bay Street
3rd Floor
P6A 1X2
Tel.: (705) 942-8417
1-800-461-0551

SCARBOROUGH

2500 Lawrence Avenue East
2nd Floor
M1P 2R7
Tel.: (416) 750-3575
1-800-268-6585
TDD: (416) 750-3302

ST. CATHARINES

1 St. Paul Street
Suite 603
L2R 7L4
Tel.: (416) 684-7406
1-800-263-4916

SUDBURY

199 Larch Street
6th Floor
P3E 5P9
Tel.: (705) 675-4391
1-800-461-4000
TDD: (705) 675-6392

THUNDER BAY

28 North Cumberland St.
Suite 403
P7A 4K9
Tel.: (807) 343-6003
1-800-465-8996

TIMMINS

210 Spruce St. South
Suite 103
P4M 2M5
Tel.: (705) 268-2838
1-800-461-7863

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595 Bay Street
4th Floor
M5G 2C2
Tel.: (416) 326-9511
TDD: (416) 326-9669

WINDSOR

500 Ouellette Avenue
Suite 305
N9A 1B3
Tel.: (519) 256-8278
1-800-265-5140
TDD: (519) 256-4410

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